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or covenantor.¹ The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. As he might make livery of seisin and retain the use, so he was permitted, at last, to grant away the use and keep the seisin. The grant of the use was furthermore assimilated to the grant of a chattel or money. A *quid pro quo*, or a deed, being essential to the transfer of a chattel or the grant of a debt,² it was required also in the grant of a use. Equity might conceivably have enforced uses wherever the grant was by deed. But the chancellors declined to carry the innovation so far as this. They enforced only those gratuitous covenants which tended to "the establishment of the house" of the covenantor; in other words, covenants made in consideration of blood or marriage.³

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[To be continued.]

THE PRINCIPLE OF LUMLEY v. GYE, AND ITS APPLICATION.

THE facts in the case of *Lumley v. Gye*⁴ may be stated in a few words. The plaintiff, the lessee of a theatre, had made a contract with Johanna Wagner to perform in his theatre for a certain time, with a condition in the contract that she should not sing nor use her talents elsewhere during the term, without the plaintiff's consent in writing. The defendant, whilst the agreement with Wagner was in force, and with full knowledge of its existence, and maliciously intending to injure the plaintiff, persuaded her to break her contract and refuse to perform in the plaintiff's theatre, and to depart from the employment. Mr. Justice Coleridge, in his dissenting opinion in the case, which has

¹ *Plow.* 298, 308; *Buckley v. Simonds*, *Winch*, 35-37, 59, 61; *Hore v. Dix*, 1 *Sid.* 25, 27; *Pybus v. Mitford*, 2 *Lev.* 75, 77.

² That a debt was, as suggested by Professor Langdell (*Contracts*, § 100), regarded as a grant, finds strong confirmation in the fact that Debt was the exclusive remedy upon a covenant to pay money down to a late period. *Chawner v. Bowes*, *Godb.* 217. See, also, 1 *Roll. Ab.* 518, pl. 2 and 3; *Brown v. Hancock*, *Hetl.* 110, 111, *per Barkley*.

³ *Bacon, St. of Uses* (Rowe's ed.), 13-14.

⁴ 2 *El. & Bl.* 216.

been so much admired, says: "In order to maintain this action one of two propositions must be maintained; either that an action will lie against one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action for seducing a servant from the master, or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner." The opinion of the majority of the court, sustaining the action, was based principally, it seems, upon the second proposition above stated, viz., that the action on the case for enticing a servant applied to any case of a contract for personal service, regardless of the nature of the services. The principle stated in the first proposition was also affirmed and sanctioned, with the qualification, not stated by Coleridge, J., that the persuasion used by the defendant, to cause the breach of contract, must be malicious.

In *Bowen v. Hall*, 6 Q. B. D. 333, which was an action for persuading a skilled workman, who, with a few others, possessed a secret process for manufacturing glazed bricks, to break his contract with the plaintiff for exclusive service for five years, the question was presented, for the first time, in a court of error, whether the decision in *Lumley v. Gye* should be affirmed or reversed; and the Court of Appeal—one judge dissenting—affirmed the decision, but distinctly rejected the proposition that the action could be maintained as an action for enticing a servant. Upon that point the court declared that the reasoning of Coleridge, J., to the effect that the action for enticing servants from their employment was given by the Statute of Labourers, and applied only in case of menial servants, was as nearly as possible, if not quite, conclusive. The Court of Appeal rested its decision upon a broad principle, deduced from the historical case of *Ashby v. White*,¹ which was asserted to have been the foundation of the decision of the majority of the judges in *Lumley v. Gye*, in one branch of their arguments, and which is stated by Lord Justice Brett in these words: "That whenever a man does an act which, in law and in fact, is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which, in the particular case, does produce such an injury, an action on the case will lie." In other words, the case of *Lumley v. Gye*, as

¹ Ld. Raym. 938; s. c. 1 Sm. L. C. (8th ed.) 472.

it must now be read and understood, is an ordinary action on the case for a tort, in which the plaintiff must show damage resulting to him, more or less directly, from a wrongful act of the defendant.

In *Lumley v. Gye* the report states that special damage was alleged, but the case does not show what the special damage was. Neither in that case nor in *Bowen v. Hall* does it appear that there was any damage beyond the breach of the contract; and, in *Bowen v. Hall*, at least, the opinion of the court does not require the plaintiff to prove any damage which could not be assessed in an action for breach of the contract itself. The mere breach of the contract by the obligor supplies to the obligee the element of damage which is necessary to support an action of tort.¹ Such damage is, to be sure, the direct act of the party who breaks the contract, but the defendant is chargeable therefor, upon the ground that he has done an act which was likely to result in a breach of contract, and consequent damage to the plaintiff; and he is liable for the probable consequences of his act, even though the wrongful act of another must intervene to cause the damage.²

But what is the wrongful act of which the plaintiff complains? An act cannot be said to be wrongful unless it is in violation of some right in the plaintiff, or of some duty owed by the defendant to the plaintiff. A person who enters into a contract with another, acquires as against that other a right to performance of the contract according to its terms, or to damages for non-performance. Those are the only rights created by the contract; and, from the point of view of contract, those are the only rights which the obligee acquires. But the court, in *Lumley v. Gye*, announced the principle that the mere existence of the contract imposed upon all third persons who knew of its existence, a duty to forbear from

¹ One effect of the decision in *Lumley v. Gye* is to give the plaintiff two causes of action, one in tort and the other in contract, for what may be substantially the same damage. As the causes of action are distinct and consistent, the plaintiff is not obliged to elect, and a recovery upon one cannot be a bar to an action upon the other; but the plaintiff is not entitled to double compensation; and, it would seem, in the absence of direct authority, that an actual recovery of damages in one action ought to be admissible in evidence to reduce damages in the other. See, however, *Bird v. Randall*, 1 W. Bl. 373, 387; *Thompson v. Howard*, 31 Mich. 309.

² In this aspect the case of *Lumley v. Gye* is opposed to *Vicars v. Wilcocks*, 8 East, 1, which held that the wrongful act of a third person in discharging the plaintiff from his employ, in consequence of words uttered by the defendant, did not constitute such special damage as would make the words actionable; but that case has been questioned (see *Lynch v. Knight*, 9 H. L. Cas. 577), and the decision in *Lumley v. Gye* is more in harmony with the general rule of damages, both in contract and tort.

doing any act maliciously, for the purpose of procuring a breach of the contract. In other words, it gave to the obligee a right to such limited forbearance as against all the world.¹

The right or duty thus declared is imposed by law, and, like all other rights and duties so created, is based upon reasons of expediency or sound policy, as understood by the court; and since it rests upon this foundation, and has been declared by a competent authority, the only practical question is how far the limitation extends.

Neither in *Lumley v. Gye* nor in *Bowen v. Hall* is it stated in general terms that it is a wrongful act to procure a breach of contract; but it is expressly declared that the defendants' act is not wrongful, and therefore not a violation of any right, unless it is malicious. Thus, in the opinion of Lord-Justice Brett, "Merely to persuade a person to break his contract may not be wrongful in law or fact, as in the second case put by Coleridge, J.² But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore an actionable act, if injury ensues from it. We think it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley v. Gye*, and which is complained of in the present case, is therefore, because malicious, wrongful."³

It is perfectly clear that the word "malicious" is not used by the court in its ordinary meaning, and that the persuasion used by the defendant need not be for the purpose of gratifying feelings of hatred or ill-will toward the plaintiff; but it is also clear that a bad motive, a purpose in acting which the law condemns as unjustifi-

¹ Another method of stating the foundation of the rule in *Lumley v. Gye* is that the obligation created by a contract is a *res* which is the subject of ownership, and the obligee is protected as owner. See 1 *Harvard Law Review*, pp. 9-10, by Professor Ames. Also Piggott, *Law of Torts*, pp. 363, 368. Conceding this position, it may still be said that the duties imposed upon the world at large in favor of the owner of property are really founded on expediency and policy, and limited by the same considerations. Thus trespasses to property, and even the destruction of property, are often justifiable against the will of the owner. See Ames's *Cases on Torts*, ch. vii. §§ 3, 4; Addison on *Torts* (6th ed.), ch. ii. § 1.

² The case put was this: B agrees with A to go as supercargo for A to Sierra Leone, "and C, urgently, and *bona fide* advises B to abandon his contract, which, on consideration, B does, whereby loss results to A. I think no one will be found bold enough to maintain that an action would lie against C." 2 *El. & Bl.* at p. 247, per Coleridge, J., dissenting.

³ 6 Q. B. D. at p. 338.

able, is necessary, in order to make out the wrongful act. The same idea is expressed in a Massachusetts case, brought upon a cause of action similar to that in *Lumley v. Gye*. The declaration set forth intentional and wilful acts, done with the unlawful purpose to cause damage to the plaintiff, without right or justifiable cause on the part of the defendant; "which," says Mr. Justice Wells, "constitutes malice." *Walker v. Cronin*, 107 Mass. 555, 562.

It is in this aspect that the case of *Lumley v. Gye* is most interesting. It is a conspicuous example of an action on the case for a tort, in which malice is declared to be an essential element.

In *Lumley v. Gye* the judges apparently limited the principle to the case of contracts for exclusive personal service. In *Bowen v. Hall* the contract which the defendant had procured to be broken was a contract for such service; but the reasoning of the court was not confined to that class of cases, and was in no manner restricted, except by the statement that the question presented by the case was whether the decision in *Lumley v. Gye* should be affirmed or reversed. As the principle was stated and combated by Coleridge, J., and as it was elaborated by the Court of Appeal, in *Bowen v. Hall*, it embraced the whole field of contract. If it is a tort maliciously to procure the breach of a contract for exclusive personal service, why is it not a tort maliciously to procure the breach of any contract? All that the plaintiff is obliged to prove is a wrongful act, and damage. To procure the breach of a contract of sale is a damage in the same manner as to procure the breach of a contract of service. Why is it not equally a wrongful act? It may be said that, for reasons of policy, contracts for personal service should receive extraordinary protection, especially in the case of persons employed on account of their talents or peculiar skill, because the loss of the contract cannot be made good to the employer. But similar considerations can readily be suggested in the case of many other contracts, and they afford a very uncertain ground upon which to limit the application of the rule. If the case of *Lumley v. Gye* is to rest upon the principle stated in *Bowen v. Hall*, consistency requires that it should be extended to the breach of any contract. In one case, at least, it has been so applied.¹

¹ *Jones v. Stanley*, 76 N. C. 355. In cases where the defendant has caused the breach of a contract for exclusive personal service, the decision in *Lumley v. Gye* has been generally followed without question. *Bixby v. Dunlap*, 50 N. H. 256; *Jones v. Blocker*, 43 Georgia, 331; *Jones v. Mills*, 2 Devereux, 540; *Haskins v. Royster*, 70 N. C. 601; *Dickson v. Dickson*, 33 La. An., 1261.

It is immaterial also whether the breach of the contract is caused by persuasion or by any other means. If performance of a contract becomes impossible through an act of violence of the defendant, done for the express purpose of preventing performance, the element of damage which is necessary to support the action is present, and the damage — the non-performance of the contract — is the same as in the case of persuasion. If a man should be prevented from performing a contract through an assault and battery committed upon his person, with knowledge of the existence of the contract, and for the purpose of preventing its performance, every reason upon which the action in *Lumley v. Gye* was sustained would require that the defendant should be held. Or if a man should agree to sell a horse, and before the time for performance arrived, a third person, with knowledge of the contract of sale, kills the horse, for the same reasons he should be held.¹ Indeed, there is an additional reason for sustaining the action in these cases; for the person prevented from performing his contract would have a valid defence in an action for breach of the contract; and if the party injured by the breach of contract could not hold the trespasser he would have no remedy. In the case of *Taylor v. Neri*,² which is the only English case upon the point, Lord Chief Justice Eyre ruled at *nisi prius* that no action would lie for an assault and battery upon a performer, whereby the plaintiff lost his services; but that case was distinguished by the judges in *Lumley v. Gye*, upon the ground that the damages were too remote, and furthermore, no malice, or knowledge on the part of the defendant that the contract existed, was proved.

Neither does the principle require, in the case of contracts for personal service, that the service should be for a fixed term. If a man who is in the employ of another merely at will is induced by the persuasion of a third person to abandon the employment, it is a damage to the employer; for he is deprived of the advantages or profits which he would have obtained from the continuance of the service. And if the persuasion used by the third person was malicious, it is a wrongful act, and he is liable in an action of tort.

¹ It seems that by the Roman law in such a case an action was given to the person to whom the promise was made, but it was the action *de dolo*. "Si servum, quem tu mihi promiseras, alius occiderit, de dolo malo actionem in eum dandam plerique recte putant, quia tu a me liberatus sis: ideoque legis Aquiliae actio tibi denegabitur." D. 4, 3, 18, 5 (Paulus). Mommsen inserts *mihi* after *de dolo malo actionem*.

² 1 Esp. 386. See, also, *Burgess v. Carpenter*, 2 Richardson (S. C.), 7.

This is the case of *Walker v. Cronin*, above cited. It was an action on the case for enticing shoemakers to leave the employment of the plaintiff, and the court held, on a demurrer to the declaration, that a good cause of action was stated in each of the three counts, although the first two contained no allegation that the men were in the employ of the plaintiff or about to enter his employ, under a contract for a term, or under any fixed contract. Mr. Justice Wells stated the principle involved in these terms: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing, and falls within the principle of the authorities first referred to." *Walker v. Cronin*, 107 Mass. 555, at 564.¹

This case is no doubt a more extreme case than *Lumley v. Gye*, but it is fairly within the principle. The only difficulty is to establish the element of damage, for no contract has been broken, and in departing from the service of the plaintiff the shoemakers did nothing but what they had a perfect right to do. But the court held that "the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy," constituted damage.

From the principle of damage here stated it is plain that logically at least the principle of *Lumley v. Gye* is applicable outside of the domain of contracts; and in point of authority the same principle, or something very similar, has often been applied in the law. Thus in the case of *Keeble v. Hickeringill*,² in the time of Lord Holt, an action was sustained for preventing wild-fowl from alighting near the defendant's decoy pond, by firing off guns in the neighborhood to frighten them away. In *Tarleton v. Magawley*³

¹ See *Evans v. Walton*, L. R. 2 C. P. 615; *Noice v. Brown*, 39 N. J. (Law) 569; *Peters v. Lord*, 18 Conn. 337.

² 11 East, 573, note; s. c. 11 Mod. 74, 130; 3 Salk. 9; Holt, 14, 17, 19. The same point was decided on similar facts in *Carrington v. Taylor*, 11 East, 571.

³ Peake, 205.

Lord Kenyon held that an action on the case would lie for discharging cannon-balls at negroes on the coast of Africa, whereby they were frightened and prevented from coming to the plaintiff's vessel to trade. In New York it has been held actionable in two instances¹ to cause the breach of a contract of sale, which was within the Statute of Frauds, and as to which the statute had not been satisfied, although both parties intended to perform. The means used by the defendant in each case were false representations, — in one case that the plaintiff did not want the goods which were the subject of the contract, and in the other that he did not intend to supply them, whereby the defendant procured the advantage of a contract with himself. In New Jersey, in the case of *Hughes v. McDonough*,² an action on the case was sustained, in which the defendant loosened a horseshoe put on by the plaintiff, for the purpose of causing the owner of the horse to believe that the plaintiff, who was a blacksmith, was an unskilful workman, whereby he lost the owner's trade. So a trader, in an action in his own right for defamatory words spoken of his wife, who assisted him in his business, was successful upon showing a falling off of custom at his store. *Riding v. Smith*, Ex. D. 91.

The above cases differ from *Lumley v. Gye* in the fact that the damage sustained was not the breach of a contract, nor indeed the loss of any property, but merely the failure to make a profit or gain; but that is sufficient to constitute damage.³ As to the other important element in the action on the case, viz., the wrongful act, the *injuria*, in each of the above instances, whether it consisted of violence, as in *Tarleton v. Magawley*, or of fraud, as in *Rice v. Manley*, it was wrongful as against the plaintiff, only because it was done without justifiable cause, for the purpose of causing the damage, or with knowledge that the damage would result. But such an act, as the word is used in *Lumley v. Gye*, and as it is used in the law of libel, is malicious, and wrongful only because it is malicious, or done without justifiable cause. It

¹ *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82. See *Green v. But-ton*, 2 C., M. & R. 707.

² 43 N. J. (Law) 459. See, also, *Rogers v. Rajendro Dutt*, 13 Moore P. C. 209, at 240.

³ This principle existed in the Roman law. The failure to make a profit (*lucrum cessans*), as well as a positive loss or injury to property (*damnum emergens*), was taken into account in assessing damages for a tort under the *lex Aquilia*. "*Inde Neratius scribit, si servus institutus occisus sit, etiam hereditatis aestimationem venire.*" D. 9, 2, 23, pr. (Ulpian). See Grueber, *Lex Aquilia*, 62, 268.

follows that the case of *Lumley v. Gye* is only one example of a class of cases in the law of torts, not included under any specific name, where damage is made actionable because it is malicious.

The act to be malicious must be done without a justifiable cause. In all of the cases thus far cited the act done by the defendant, where it was a lawful act, was done in the exercise of some common right, like the right to enter into a contract or to carry on a business or trade; and, in such cases, it may safely be stated that if such an act is done with a malicious purpose, or, what is the same thing, in violation of superior rights acquired by others, with knowledge of the existence of such rights, the act becomes wrongful and subjects the defendant to damages. So far actual decision has gone, though not without conflict.¹ But where the act is done by the defendant in the exercise of some right vested in him, individually, as by contract or grant, or as owner of property, a malicious purpose will not render the act unlawful, provided the method of exercising the right is lawful. In that class of cases the principle of *Lumley v. Gye* has no application, for the weight of authority is strongly in favor of the proposition that malice is immaterial.² As a question of principle, much might be said in favor of making all malicious acts unlawful, where malice is clearly proved; but the question being one that depends entirely upon reasons of expediency and policy, a course of decision, in different jurisdictions, tending strongly in one direction, is very convincing evidence of the weight of reason in the case.³

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¹ *Heywood v. Tillson*, 75 Maine, 225; *Payne v. Western R.R. Co.*, 13 Lea, 507.

² See *Cooley on Torts*, 81, 581, where authorities are collected. There are dicta to the contrary, and the case of *Chesley v. King*, 74 Maine, 164, was directly *contra*; but that case seems to be of no authority since the decision in *Heywood v. Tillson*, *supra*.

³ In the Roman law, in the case of adjoining owners, it seems that a malicious use of property was actionable. "Denique Marcellus scribit, cum eo qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem; et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit." D. 39, 3, 1, 12 (Ulpian). A similar principle is recognized in the Scotch law. See *Pollock on Torts*, 136, 137.